IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 26, 2006 Session

CUSTOM BUILT HOMES BY ED HARRIS, A DIVISION OF PROFESSIONAL AUTOMOTIVE, INC. v. JOHN McNAMARA, ET AL., v. EDWARD D. HARRIS, ET AL.

Appeal from the Chancery Court for Williamson County
No. 23838 R. E. Lee Davies, Judge

No. M2004-02703-COA-R3-CV - Filed on December 11, 2006

Home construction contractor appeals the trial court's ruling that he breached the contract to construct a custom built home. Contractor entered into a written contract with John and Mary McNamara for the construction of their 6,000 square foot home. After tensions between the parties escalated over several months, the contractor left the job site, the McNamaras terminated the contract, and hired other contractors to complete the work. Contractor and the McNamaras each sued the other for breach of contract. The trial court found the contractor breached the contract and awarded the McNamaras damages for the repair and completion of the work, including the cost of a new roof. The contractor appeals contending the trial court erred by finding he was in breach and contending it erred in the calculation of damages awarded to the McNamaras. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Robert H. Plummer, Jr., Franklin, Tennessee, for the appellants, Edward D. Harris and Professional Automotive, Inc.

Ernest W. Williams and John D. Schwalb, Franklin, Tennessee, for the appellees, John McNamara and Mary McNamara.

OPINION

John and Mary McNamara initiated discussions with Ed Harris of Custom Built Homes in the spring of 1994 for him to design and construct a custom home for them. They requested that he design and price an approximately 6,000 square foot home which was to sit atop a hill on a lot they had purchased in a new residential development in Williamson County. Mr. Harris submitted a

design and a contract for constructing the home for a total price of $389,090.[1] The plans were approved, and the contract was signed in September of 1994. Construction began in November of 1994.

The plans accompanying the construction contract contained a significant amount of detail, but even with the details, the parties understood that the McNamaras would need to make decisions on various items that had not yet been finalized, and the parties further recognized the McNamaras might wish to make changes to previous decisions. The contract provided for these decisions and changes to be memorialized on "Change Order" forms.

The McNamaras made several changes to the original plans for their house ranging from the location of chimneys, to the design of the driveway, to trim around the fireplaces. The contract allowed for these changes, and Mr. Harris expected changes, but the relationship between the parties was tolerant at best. Mr. Harris complained frequently about not getting timely decisions from the McNamaras, and the McNamaras complained frequently about Mr. Harris not providing them with specific budgeted amounts for various items. The McNamaras also complained to Mr. Harris in a written correspondence in May 1995, about the front staircase not meeting codes, the roof shingles being of different dye lots, trees being cut, the garage foundation not being laid according to plans, which affected the roof line, the home being moved eight feet forward on the lot thereby eliminating space for their circular driveway, and the use of flexible duct work for the HVAC. Although Mr. Harris responded to these concerns via letter of May 27, 1990, the parties continued a pattern of ill-tempered communications.

On July 14, 1995, Mr. Harris notified the McNamaras in writing that he was awaiting certain decisions, and without those decisions he was limited on the amount of work he could do on their home. He informed them that once he ran out of work, he would have to leave their home to work on another site until these decisions were made. Mrs. McNamara responded on July 19 setting out several of the requested decisions, yet tensions remained high.

The parties met on July 20, 1995, in an effort to resolve their differences. It was decided at that time that Mr. Harris would provide a comprehensive proposal for completing the house. Although Mr. Harris submitted a proposal on August 7, 1995, it failed to address all of the McNamaras' concerns that had previously been discussed. While all the bantering was going on between the parties, Mr. Harris, sometime before August 16, 1995, vacated the McNamaras' property and had his crew remove scaffolding and other equipment including the portable toilet from the premises.[2]

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[1]The price for constructing the home was $368,965 but an additional expense for lot development of $20,125 was necessary because the lot had a substantial amount of colluvial soil, which necessitated the use of a geotechincal engineer, an interceptor ditch behind the home, and subfootings around the entire home that were eight feet deep.

[2]The specific date that Mr. Harris ceased construction on the home is unclear, but the McNamaras' attorney sent a letter on August 16 discussing Mr. Harris' departure from the work site.

On August 16, 1995, the McNamaras' attorney sent a letter to Mr. Harris' attorney detailing their various complaints and summarizing matters discussed at the July 20 meeting. The attorney further commented on the removal of the crew and tools from the home, declared the removal to be a breach of the contract, and instructed Mr. Harris' attorney to advise that Mr. Harris was "no longer welcome on the property and that he is to return his keys to the house." Mr. Harris did as he was instructed, and thereafter, the McNamaras hired another contractor, Whiteside and Bryan, to complete the remainder of their home.

At the point when Mr. Harris left the house, it was approximately 70% complete, and Mr. Harris had been paid $272,405 of the original contract price of $389,090. The McNamaras paid an additional $197,312 to the new contractor, subcontractors, and other workers. In addition to completing the work Mr. Harris had not done, the new contractor repaired work that had been done inadequately, and they added approximately $80,000 worth of upgrades that the McNamaras desired.

Mr. Harris filed this action against the McNamaras on November 26, 1996, for breach of contract, claiming the McNamaras had wrongfully terminated their agreement. The McNamaras filed a counter-claim against Mr. Harris for breach of contract. The trial court dismissed Mr. Harris' claim for damages, determined that Mr. Harris breached the contract, and awarded damages to the McNamaras totaling $41,395.74.

STANDARD OF REVIEW

The interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc*. 995 S.W.2d 88, 95 (Tenn. 1999). Therefore, a trial court's interpretation of a contract is subject to a Tenn. R. App. P. 13(d) review on appeal. *Angus v. W. Heritage Ins.* Co., 48 S.W.3d 728, 739 (Tenn. Ct. App. 2000). However, if a party asserts *as a fact* that the other party breached the contract, then a question of fact is presented which is properly addressed to the trier of fact. *See generally Carter v. Krueger*, 916 S.W.2d 932, 934-935 (Tenn. Ct. App. 1995). Findings of fact by a trial court are reviewed *de novo* with a presumption the findings are correct unless the preponderance of the evidence is otherwise. *Id.* at 935. However, if the trial judge has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). We give great weight to a trial court's determinations of credibility. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G* Constr., *Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000).

ANALYSIS

Mr. Harris commenced this action contending the McNamaras breached the construction contract when they wrongfully terminated his services, and they are liable for his consequential damages. The McNamaras denied the allegations of Mr. Harris and filed a counterclaim contending Mr. Harris breached the contract thereby justifying their termination of the contract. They further claimed the termination necessitated that they hire another contractor to complete the work for which Mr. Harris was responsible, and that Mr. Harris is liable for their damages. The trial court found that Mr. Harris breached the contract by failing to construct the McNamaras' house as the contract required and that he thereafter wrongfully terminated the contract when he left the job site in August of 1995. Our review of the issues requires that we first determine which party breached and/or wrongfully terminated the contract before we analyze the damages that flowed from such breach. *See Carter*, 916 S.W.2d at 936 (citing *McClain v. Kimbrough Constr. Co.*, 806 S.W.2d 194 (Tenn. Ct. App. 1990))(other citations omitted).

BREACH OF CONTRACT

Mr. Harris contends that the McNamaras breached the contract. Mr. Harris' contentions are based upon facts, instead of an interpretation of the contract. Accordingly, the issue of which party breached the contract is a question of fact. *Carter*, 916 S.W.2d at 934-935.

The trial court concluded that "Mr. Harris breached the contract" and that he abandoned the "building contract" for which he must compensate the McNamaras for their damages. The conclusions were based on numerous findings of fact that were set forth in the trial court's Memorandum Opinion and the resulting final order. Those findings included in pertinent part that Mr. Harris refused "to provide an accurate accounting of expenses along with his actual budget," and that "Mr. Harris' actions were unreasonable which caused and led to a stalemate which Mr. Harris finally broke when he instructed his construction crew to remove equipment, materials, and the portable restroom facility from the property, effectively terminating the contract."

A contracting party may terminate the contract when the other party:

> (1) is wholly unable to complete the contract, *City of Bristol v. Bostwick*, 146 Tenn. 205, 211, 240 S.W. 774, 776 (1922); (2) manifests an intent to abandon the contract, *Brady v. Oliver*, 125 Tenn. 595, 614, 147 S.W. 1135, 1139 (1911); (3) manifests an intent to no longer be bound by the contract, *Church of Christ Home for Aged, Inc. v. Nashville Trust Co.*, 184 Tenn. 629, 642, 202 S.W.2d 178, 183 (1947); or (4) commits fraud on the party seeking to terminate the contract. *W.F. Holt Co. v. A & E Elec. Co.*, 665 S.W.2d 722, 730 (Tenn. Ct. App. 1983).

McClain v. Kimbrough Constr. Co., 806 S.W.2d 194, 197-198 (Tenn. Ct. App. 1990). The trial court's findings constitute findings that would support a conclusion that Mr. Harris either manifested an intent to abandon the contract, or manifested an intent to no longer be bound by the contract,

either of which would serve a basis for the McNamaras to justifiably terminate the contract and seek damages flowing from Mr. Harris' breach. *See Id*.

The evidence in the record shows that Mr. Harris provided the McNamaras with notice on July 14, 1995, that without certain decisions, he could not continue to work on the home for more than a few weeks. Mrs. McNamara responded to this letter on July 19 setting out decisions on several, but not all of the matters raised by Mr. Harris. The next day, on July 20, the parties met at the office of Mr. Harris' attorney to discuss unresolved issues including the McNamaras' dissatisfaction with the manner in which the house was progressing. At that meeting, the parties agreed that Mr. Harris would submit a detailed proposal for the completion of the house accompanied by a detailed budget of what the cost would be for completion. The record indicates that while the McNamaras were awaiting the anticipated proposal for completion of their house, Mr. Harris removed his crew, materials, equipment, and portable restroom from the job site. Moreover, the anticipated proposal for completing the house was never provided by Mr. Harris.

A host of facts surround the parties' relationship and the reasons for its deterioration, including Mr. Harris' frustration with Mrs. McNamara and the McNamaras' dissatisfaction with what they characterized as substandard work. Although others testified, the issues of whether Mr. Harris breached the contract by performing substandard work, whether he abandoned the contract, and whether the McNamaras' termination of Mr. Harris was justified hinge almost entirely on choosing between Mr. Harris' version of the facts or Mrs. McNamara's. On almost every factual dispute between Mr. Harris and Mrs. McNamara, the trial court accepted Mrs. McNamara's version of the facts over Mr. Harris'.

As we have often noted, the trial court is in the best position to evaluate the evidence, judge the credibility of the witnesses, and determine the true reason for and cause of the demise of the parties' relationship that culminated in Mr. Harris ceasing construction and leaving the McNamaras' property. This is because the trial court is "able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility." *Harley v. Harrison*, No. M2005-02099-COA-R3-CV, 2006 WL 2644372, at * 3 (Tenn. Ct. App. Sept. 13, 2006)(citing *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990))(other citations omitted). Accordingly, we do "not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Harley*, 2006 WL 2644372, at * 3 (citing *Humphrey v. David Witherspoon, Inc*., 734 S.W.2d 315, 316 (Tenn. 1987))(other citations omitted).

After examining the conflicting testimony provided by Mrs. McNamara and Mr. Harris, the trial court found that Mr. Harris breached the contract in a number of ways. The trial court was in the best position to weigh the testimony of Mrs. McNamara and Mr. Harris, and we have concluded that the evidence does not preponderate against the trial court's finding that Mr. Harris' breached the contract. Although it is disputed why Mr. Harris removed his crews, portable toilets, etc., from the job site, he did indeed leave the job site taking all of his crew and tools with him. A contractor's departure from a job site can be found to manifest an intent to no longer be bound by the contract. *See McClain,* 806 S.W.2d at 197-198. Accordingly, the trial court was justified to conclude from

the facts of the case, including Mr. Harris' departure from the job site, that it was his intent to no longer be bound by the contract, thus the McNamaras were justified in terminating the contract with Mr. Harris.

Having affirmed the trial court's findings that Mr. Harris was in breach of the contract and that the McNamaras were justified in terminating the contract, we move to the issue of damages, if any, the McNamaras sustained as a result of Mr. Harris' breach of the contract.

OPPORTUNITY TO CURE BREACH

As a first line of defense to the McNamaras' claim for damages, Mr. Harris contends the McNamaras failed to give him the required notice and opportunity to cure the alleged defects in his work. Requiring notice and a reasonable opportunity to cure defects in the performance of a contract is a sound principle. *Carter*, 916 S.W.2d at 935. It is designed to allow the defaulting party the opportunity "to repair the defective work, to reduce the damages, to avoid additional defective performance, and to promote the informal settlement of disputes." *Id*. (citing *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal.3d 374, 525 P.2d 88, 92, 115 Cal.Rptr. 648, 652 (1974); *Sturdy Concrete Corp. v. Nab Constr. Corp*., 65 A.D.2d 262, 411 N.Y.S.2d 637, 644 (1978)). Although requiring a party to a contract to give notice to the defaulting party and a reasonable opportunity to cure defective work is sound, and the failure to do so may preclude a complaining party from recovering damages, we find it does not afford Mr. Harris any relief here because as the trial court found, Mr. Harris abandoned the contract. By abandoning the contract, Mr. Harris relieved the McNamaras of the requirement to afford him the opportunity to cure. *See Brady v. Oliver*, 147 S.W. 1135, 1138 (Tenn. 1911) (holding that where one party to a contract announces in advance his intention not to perform, the other party may treat the contract as broken, and sue at once for the breach). It is well settled that if one party to a contract voluntarily disables himself from performing his part of the contract, the other party has an immediate right of action for the breach. *Id*. (citations omitted).

DAMAGES

Having determined Mr. Harris is not relieved of the claim for consequential damages, we look to the type and amount of damages to which the McNamaras may be entitled. The damages to be awarded in a particular case is essentially a fact question. *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 541 (Tenn. Ct. App. 2005)(citations omitted). The proper measure of damages, however, may be a question of law. *Id*. "When a contractor fails to perform a contract for construction or fails to complete the project, then the measure of damages sustained by the owner is the difference between the contract price and the cost of finishing the work according to the contract." *Harley*, 2006 WL 2644372, at *3 (citing *St. John v. Bratton*, 150 S.W.2d 727, 728 (Tenn. Ct. App. 1941)).

The most significant claim for damages presented by the McNamaras pertained to the roof, which, as of the date of trial, had not been repaired or replaced. The McNamaras presented expert testimony, which the trial court specifically credited in its Order, that the workmanship of the roof

was substandard, and that the best course of action was to replace the entire roof. Moreover, the McNamaras testified that the color of their roof shingles was not uniform and that the roof leaked. Although there is conflicting testimony regarding the roof, the trial court credited the testimony of two roofing experts, Harrison McCampbell and Don Kennedy, in finding the roof was substandard and needed to be replaced. Based on this credibility determination, the trial court awarded $17,219 for the complete removal and replacement of the McNamara's roof.

In addition to the roof, the McNamaras submitted claims for approximately thirty categories of work performed by other contractors to repair or complete the work for which Mr. Harris was allegedly liable. Although, we have concluded, as the trial court did, that Mr. Harris breached the contract by performing substandard work in numerous aspects of the work, we have concluded that the McNamaras did not sustain any economic damages related to the other alleged deficiencies. This is because they were able to engage other contractors to repair and/or complete the work within the budget required of Mr. Harris. Therefore, they are not entitled to recover the other claimed damages.

The purpose of assessing damages in a breach of construction contract case is to place the non-breaching party in the position the non-breaching party would have been in had the contract been performed properly. *GSB Contractors, Inc*., 179 S.W.3d at 541. The fundamental principle which underlies the measure of damages for defects or omissions in the performance of a construction contract is that "a party is entitled to have what he contracts for or its equivalent." *Edenfield v. Woodland Manor, Inc*., 462 S.W.2d 237 (Tenn. Ct. App. 1970). Accordingly, the McNamaras are entitled to have the home for which they contracted at the cost of $389,090. Conversely, Mr. Harris is not liable to the McNamaras for any upgrades or additional work that was not required of Mr. Harris in the contract.

The contract price for Mr. Harris to construct the house was $389,090. The McNamaras paid Mr. Harris $272,405 for completing approximately 70% of the work. Thereafter, the McNamaras paid an additional $197,312 to other contractors to complete the project. The total the McNamaras paid contractors, including Mr. Harris, for the construction of their home was $469,717, which is $80,627 more than the contract with Mr. Harris. The additional $197,312, however, was not limited to repairing or completing Mr. Harris' work. It is undisputed that the McNamaras requested additional work and upgrades not called for in the contract with Mr. Harris and paid other contractors for that work. What work was necessary to repair Mr. Harris' substandard work, however, is disputed. Moreover, the cost of the additional work or upgrades is disputed. The burden of proof was on the McNamaras to prove that the work done by and the fees paid other contractors was necessary to repair substandard work by Mr. Harris or to complete work for which Mr. Harris was contractually responsible.[3] *See GSB Contractors, Inc*., 179 S.W.3d at 543.

3This burden should not be confused with the burden of proof that would have been on Harris had he been contending that the cost of repairs was unreasonable. *See GSB Contractors*, 179 S.W.3d at 543 (citations omitted) (stating "the burden is on the defendant to show that the cost of repairs is unreasonable when compared to the diminution in value due to the defects and omissions."). The McNamaras' burden was to show that the costs were actually for repairs as opposed to additions or upgrades.

The McNamaras were entitled to the home they contracted for at the total cost of $389,060. Although the McNamaras proved a significant portion of the work done by the other contractors was necessary to repair or complete work for which Mr. Harris was contractually responsible, it was also established that much of that work was not necessary to repair or complete work for which Mr. Harris was responsible. To the contrary, it was for upgrades and additional work not called for in the contract with Mr. Harris.[4] The difference between the contract price and the amount paid Mr. Harris was $116,685. To recover from Mr. Harris, the McNamaras needed to establish that more than $116,685 of the work by the other contractors was necessary to repair or complete work for which Mrs. Harris was responsible. The mere fact the McNamaras paid other contractors for work that may or may not have been necessary to repair or complete Mr. Harris' work is insufficient to prove that Mr. Harris is liable for the additional expense the McNamaras incurred.

Although the McNamaras proved they spent an additional $197,312, which is $80,000 more than the balance owing on the contract with Mr. Harris, they admitted, and the trial court found that $80,000 of that amount was in upgrades for which Mr. Harris would not be liable.[5] Although it is ironic that the difference between what the McNamaras paid other contractors and the admitted amount of upgrades is $80,000, the significance of this finding is that the McNamaras failed to prove they spent more to repair or complete the work for which Mr. Harris is responsible than the balance owing on the contract.

The McNamaras paid Mr. Harris and other contractors more than the contract price, however, the McNamaras have a home with features above and beyond those for which they originally contracted. We fail to see how they have sustained any damage other than the cost to remove and replace the substandard roof. Accordingly, we have concluded that but for the cost of replacing the roof, the McNamaras sustained no damages as a result of Mr. Harris' breach.

INDIVIDUAL LIABILITY OF MR. HARRIS

The final issue presented by Mr. Harris is whether the trial court erred by holding him personally liable. He contends the contracting party was Custom Built Homes, a Division of

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[4]Five of the thirty damage items awarded were for various amounts of concrete and crusher stone, and the testimony in the record is that this stone was for the driveway that exceeded the one already installed and that was larger than the one covered by the contract. The court also awarded costs for driveway pipe, which was installed only pursuant to the new driveway plans that the McNamaras elected to implement and was not included in the original contract. The court awarded costs associated with waterproofing the crawl space of the home despite the only testimony in the record on this issue being by the representative of the installation company who testified that he installed it because it was his personal preference to do so even though homes like the McNamaras', with crawl spaces as opposed to basements, do not need this type of waterproofing. The trial court also awarded multiple damages amounts for grading in the back of the house without any consideration of the fact that the McNamaras installed a pool which was contracted for with someone else besides Harris.

[5]Specifically, the trial court found, "the McNamaras admitted they contracted for approximately $80,000 in upgrades. . . ."

Professional Automotive, Inc., a corporation, for which he is not liable. Specifically, Mr. Harris is contending the trial court erred by piercing the corporate veil. We find no merit with this argument.

Contrary to Mr. Harris' argument, this is not a case of piercing the corporate veil. Rather, it is a case of Mr. Harris failing to effectively disclose to the McNamaras that he intended to do business as a corporation. In determining whether a corporate director, officer, or agent is liable upon a contract, "the particular form of the promise in, or signature to, such contract is of prime importance in deducing the intention in such respect with which the contract was executed." *Anderson v. Davis*, 234 S.W.2d 368, 369 (Tenn. Ct. App. 1950)(citations omitted). "A correct form of signature which is uniformly regarded as imposing no personal liability upon the officer signing is that of a signature containing the corporate name, followed by the word 'per' or 'by', which, in turn, is followed by the name of a corporation officer." *Id.* No such signature appears in the contract between Mr. Harris and the McNamaras. Accordingly, we affirm the finding that Mr. Harris is the appropriate party against whom liability should be assessed.

IN CONCLUSION

We affirm the judgment of the trial court that Mr. Harris breached the contract for which he is liable for consequential damages sustained by the McNamaras. We also affirm the determination that he installed a substandard roof, the remedy for which is to remove and replace the roof, and the McNamaras are entitled to a judgment against Mr. Harris for that cost being $17,219. We, however, reverse the judgment of the trial court to the extent that we find the McNamaras did not prove they sustained or are entitled to other damages.

Having affirmed in part and reversed in part the judgment of the trial court, we remand with instructions to enter a judgment consistent with this opinion. One-half of the costs of appeal are assessed against the Appellant, Ed Harris, and one-half are assessed against the Appellees, John and Mary McNamara.

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FRANK G. CLEMENT, JR., JUDGE